

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

663

**United States Court Of Appeals For
The District Of Columbia**

No. 23022

UNITED STATES OF AMERICA, Appellee

VS.

HOWARD D. BROWN, Appellant

United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 25 1969

Nathan J. Paulson
CLERK

**APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF COLUMBIA**

BRIEF OF APPELLANT

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AUGUST 19, 1969

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA

No. 23022

UNITED STATES OF AMERICA, Appellee

vs.

HOWARD D. BROWN, Appellant

APPEAL FROM THE UNITED STATES
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OF COLUMBIA

BRIEF OF APPELLANT

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August 19, 1969

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QUESTIONS PRESENTED

1. Whether the entering of a stipulation by defense counsel and the admission of the stipulation in evidence without a hearing as to the defendant's waiver of his rights or compliance with F.R.Cr.P. Rule 11, where the stipulation establishes the government's entire case on the merits, is violative of defendant's constitutional rights.

2. Whether the circumstances surrounding the defendant's statement to the FBI demonstrated a knowing and intelligent waiver of constitutional rights so as to render the statement admissible?

This case has not previously been before this Court under the same or similar title.

STATUTES, CONSTITUTIONAL PROVISIONS,
AND RULES INVOLVED

DISTRICT OF COLUMBIA CODE

22 D.C. Code, Section 1401:

Whoever, with intent to defraud or injure another, falsely makes or alters any writing of a public or private nature, which might operate to the prejudice of another, or passes, utters, or publishes, or attempts to pass, utter, or publish as true and genuine, any paper so falsely made or altered, knowing the same to be false or forged, with the intent to defraud or prejudice the right of another, shall be imprisoned for not less than one year nor more than ten years. (Mar. 3, 1901, 31 Stat. 1326, ch. 854, §843.)

UNITED STATES CODE

18 U.S. Code, Section 2314:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of \$5,000 or more; or;

v.

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; . . . Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11:

A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

Rule 52(b):

Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

UNITED STATES CONSTITUTION

Amendment V:

No person shall be . . . compelled in any criminal case to be a witness against himself

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA

No. 23022

UNITED STATES OF AMERICA, Appellee

vs.

HOWARD D. BROWN, Appellant

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF COLUMBIA

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

On September 19, 1968, in the United States District Court for the District of Columbia, appellant, Howard D. Brown was convicted of 8 counts of forgery and uttering, (22 D.C. Code §1401) and 2 counts of interstate transportation of forged securities, that is, bank checks, (18 USC §2314). He was sentenced on December 6, 1968 for

a period of three months for observation and study and then was sentenced on March 21, 1969 to ten (10) years on each of the counts one through ten, said sentences to run concurrently with the Court stipulating that the sentences should be served in a penal institution competent to provide necessary medical supervision and treatment. Notice of appeal from the final decision was filed in a timely manner, and in May, 1969 this Court granted appellant's petition for leave to prosecute his appeal without prepayment of costs. This Court has jurisdiction upon appeals to review the judgment of the District Court under 28 U.S.C. §1291.

REFERENCE TO RULINGS

- (1) The Court received in evidence, without a hearing either as to waiver of constitutional rights or compliance with F.R.Cr.P. Rule 11, stipulated facts as the case in chief which were tantamount to a plea of guilty on the merits. (Tr. 27)
- (2) The Court ruled that the defendant's statement to the F.B.I. agent was voluntary and was admissible. (Tr. 306-7)

STATEMENT OF THE CASE

Appellant was arrested on September 18, 1967 and charged with forgery and uttering and the interstate transportation of forged securities, i.e. bank checks. The defendant appeared before the United States Commissioner on September 18, 1967 and his bond was set at \$2,000.00 on September 18, 1967. On September 18, 1967

defendant waived preliminary hearing. In an indictment filed October 9, 1967, the appellant was charged with 8 counts of forgery and uttering (22 D.C. Code §1401) and 2 counts of interstate transportation of forged securities, that is, bank checks (18 U.S. Code §2314). At his arraignment on October 20, 1967 the appellant pleaded not guilty to all counts of the indictment. By order dated October 20, 1967 defense counsel was appointed. On November 9, 1967 a motion for mental examination (originally filed pro se, and later formally presented by counsel) was heard, argued and granted by order of Judge Walsh. On May 29, 1968 an order finding the defendant competent to stand trial was signed and filed by Judge Waddy. A motion for additional mental examination of the defendant was denied by Judge Curran on June 20, 1968.

Trial was commenced on September 17, 1968, continuing on September 18, 1968 and completed on September 19, 1968, at which time the jury returned a verdict on each of the ten (10) counts of guilty as charged. At the trial the case in chief of the prosecution was presented through a stipulation agreed to by defendant's counsel reciting the facts setting forth the commission of the acts described in the indictment. (Tr. 27-34, Govt. Ex. 1) The stipulation showed that there were a total of four checks all payable to Market Tire Company in Washington, D.C. the first two checks written on June 29, and July 3, 1967 were used to purchase tires from one Market Tire Store while the two checks dated July 8, and July 10, 1967 were both used to purchase tires at another Market Tire store. The basis of the charge that there was an interstate transportation of forged documents was founded on the fact that the checks dated July 8, and 10, 1967, while paid to the Market Tire Company in the District of Columbia, were drawn on

the Suburban Trust Company in Hyattsville, Maryland. The government closed its case in chief without having any witness testify directly but relied totally upon the stipulation and the four identified checks. (Tr. 35)

In the defendant's case, the defendant himself did not testify but testimony was offered by his mother (Tr. 36-60) and by a psychiatrist, Dr. David Dabney (Tr. 61-106, 136-192) to establish insanity as a defense. In rebuttal to the evidence on the insanity defense the government offered Dr. William Hammon of St. Elizabeths Hospital (Tr. 219-281) plus the stipulated evidence of F.B.I. Agent Hoggard as to statements made by the defendant at the time of his arrest relating to the planning and carrying out of the offenses charged. Both Dr. Dabney and Dr. Hammon testified as to facts supporting their diagnosis that the defendant was suffering from a mental disease or defect. However, they differed as to the precise mental disease or defect under which the defendant was suffering: Dr. Dabney describing the defendant's illness as psychopathic personality disturbance with anti-social reaction (Tr. 74, 80) as sociopathic personality, anti-social reaction (Tr. 91); while Dr. Hammon described the patient as having a severe problem designated as a character neurosis best described or classified as passive-aggressive personality, but disagreed that the defendant would properly be diagnosed as a sociopathic personality, anti-social reaction (Tr. 234, 237-8). While Dr. Dabney believed there was a causal relationship between the defendant's illness and the commission of the offenses (Tr. 91-92), Dr. Hammon was of the opinion that there was no such causal relationship. (Tr. 242)

In rebuttal the government offered the testimony, through stipulation, of F.B. I. Agent Hoggard regarding statements made by the defendant at the time of his arrest on September 18, 1967. (Tr. 313-15) After a separate hearing as to the admissibility of such confession, even for the limited purpose of relating it to the insanity defense, the Court, following an earlier objection by the defendant (Tr. 211), permitted the admission of this evidence. (Tr. 306-7). The F.B.I. agent's statement went far beyond the issues of the case and mentioned two accomplices plus an unnamed fourth person as well as referring to the passing of between 30 and 40 bad checks. (Tr. 314-15) The Court instructed the jury prior to the admission of this statement that it was to be considered by them only as to the insanity defense and were to be put to one side in the minds of the jury with respect to the issue of whether or not the crimes were committed. (Tr. 312-13)

A defense motion for a judgment of acquittal by reason of insanity was denied. (Tr. 316)

SUMMARY OF ARGUMENT

I. Rather than require that the government present evidence through competent witnesses subject to cross-examination in proof of the government's case in chief, defense counsel stipulated all of the evidence necessary to establish that the defendant had committed offenses charged. In his opening statement to the jury, defense counsel admitted that the defendant wrote and uttered checks in the amounts specified as the government charged. However, there is no indication on the record that the defendant made an intelligent and knowing waiver of his constitutional rights. No hearing in compliance with Rule 11, F.R.Cr.P. was provided. The stipulation by defense counsel of the government's entire case in chief had the same effect as a plea of guilty. The stipulation was received in violation of defendant's constitutional rights.

II. A statement by the defendant to the FBI at the time of his arrest was admitted in evidence by the Court as having been voluntarily made even though the evidence of the circumstances surrounding the making of the statement reveal that the defendant had a history of mental illness and alcoholism, he was drinking straight liquor at midday when arrested, he was nervous and shaking, defendant initially refused to sign a waiver form, there was distracting physical activity at the time of the oral warnings, the oral warnings were incomplete, defendant may have been without his reading glasses and an earlier statement may have been used by way of inducement. These circumstances collectively destroy the possibility of a knowing and intelligent waiver by the defendant of his constitutional rights. The admission of the defendant's statement referring to offenses beyond those charged was particularly prejudiced because it not only aided the government's case in chief but, more importantly, it seriously damaged defendant's insanity defense. The admission of this statement was violative of defendant's constitutional rights.

I. THE ADMISSION OF APPELLANT'S GUILT IN
THE INTRODUCTION THROUGH STIPULATION
OF THE ENTIRE CASE IN CHIEF FOR THE
GOVERNMENT WITHOUT A CLEAR WAIVER BY THE
DEFENDANT OF HIS CONSTITUTIONAL RIGHTS UNDER
THE FIFTH AND SIXTH AMENDMENTS
CONSTITUTED REVERSIBLE ERROR *

Rule 11 of The Federal Rules of Criminal Procedure provides:

The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. (emphasis added)

The notes of Advisory Committee on Rules state that "The fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all in the federal courts."

Rule 11 was amended in 1966 to make it very clear that the court must address the defendant personally and that the defendant must understand the consequence of his plea, Notes Of Advisory Committee On Rules. The United States Supreme Court has long recognized the importance of ascertaining that a defendant who pleads guilty does so with a full understanding of the consequences. Kercheval v. United States, 274 U.S. 220, 223 (1927). In Machibroda v. United States, 368 U.S. 487 (1962) the court reiterated

* See Tr. 23, 27-35, 106, 196, 313-315

its position:

Out of just consideration for persons accused of a crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily with full understanding of the consequences. Id at 493

This Circuit has required strict compliance with the letter and the spirit of Rule 11, Fed.R.Crim.P. the Resolution of the Judges of the U.S. District Court for the District of Columbia promulgated June 24, 1959 requires that a judge conduct an extensive interrogation of a defendant before accepting a guilty plea. Everett v. United States, 119 U.S. App.D.C. 60, (n.3), 336 F.2d 979, 980 (n.3) (1964). A defendant must admit his guilt "voluntarily and with free will" Bishop v. United States, 121 U.S. App.D.C. 243, 349 F.2d 220, 221 (1965).

Although the instant case does not involve an actual guilty plea, the cumulative effect of the actions of defense counsel amounted to a concession that the defendant had committed the offenses charged. Defense counsel stipulated all of the facts with respect to all of the elements of the offenses (Tr.27-35) and introduced the defendant's criminal record into evidence. (Tr.106) In his opening statement, defense counsel plainly admitted the defendant's guilt in the following language:

"Mr. O'Donnell: Your Honor, ladies and gentlemen of the jury: The defendant in this case admits writing the checks and uttering the checks in the amounts specified and passing the checks as you have heard Mr. Silbert state, and this has been done in the form of a written stipulation which Mr. Silbert will read to you later. The only defense in this case is that of insanity." (Tr.23)

Defense counsel also admitted that he did not challenge the fact that the offense was committed (Tr.196) and stipulated the testimony of an agent of the Federal Bureau of Investigation pertaining to a confession made by the defendant (Tr.313-315). Thus the appellant's attorney clearly admitted the guilt of the defendant on the merits of the case and relied completely on the defense of insanity.

In conceding the defendant's guilt on the merits, defense counsel effectively waived the appellant's privilege against self-incrimination, his right to confront the witnesses against him, and his right to be tried by a jury of his peers. This fact, in and of itself, raises serious constitutional questions.

The actions of appellant's counsel waived the appellant's privilege against self-incrimination since they not only incriminated the appellant but actually admitted that the appellant committed the offenses. The importance of the Fifth Amendment privilege is not open to question. The United States Supreme Court has called the privilege "the essential mainstay of our adversary system". Miranda v. Arizona, 384 U.S. 436, 460 (1966) Defense counsel's actions waived the appellant's right to confront the witnesses against

him since the stipulations relieved the government of the task of presenting its witnesses. Thus no government witnesses were called and the defense had no opportunity for cross-examination. The importance of the right to confrontation does not require a lengthy discussion. As early as 1912 the United States Supreme Court recognized that the defendant's Sixth Amendment right to be present and confront the witnesses against him is "scarcely less important to the accused than the right of trial itself." Diaz v. United States, 223 U.S. 442, 455 (1912). More recently in Pointer v. Texas, 380 U.S. 400 (1965) the Supreme Court emphasized the fundamental importance of this right when it stated:

There are few subject, perhaps, upon which this court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law. (Id at 405)

Finally, his attorney's actions waived the defendant's right to be tried and found guilty by a jury of his peers as guaranteed by the Sixth Amendment. While the appellant was tried before a jury on his insanity defense, the stipulations made by his counsel in effect confessed the guilt of the

defendant on the merits of his case. Therefore, these actions amounted to a waiver by the appellant's counsel of the appellant's right to be found guilty by a jury. Of the right to jury trial the Supreme Courts has recently said:

Our conclusion is that in the American States, as in the federal judicial system a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants. Duncan v. Louisiana, 391 U.S. 145, 157-158 (1968)

All three of these precious constitutional rights, the privilege against self-incrimination, right of confrontation, and right to jury trial, were effectively waived by appellant's counsel without any indication of the wishes of the appellant.

The standard set for a competent waiver of a fundamental right is clear. As the Supreme Court stated in Fay v. Noia, 372 U.S. 391 (1963):

"The classic definition of waiver enunciated in Johnson v. Zerbst, 304 U.S. 458, 464, 82 L.ed 1461, 1466, 58 S.Ct. 1019, 146 ALR 357 - an intentional relinquishment or abandonment of a known right or privilege furnishes the controlling standard." Id at 439

Since that case, the Supreme Court has reaffirmed the Zerbst standard on several occasions. Brookhart v. Janis, 384 U.S. 1, 4 (1966);

Miranda v. Arizona, 384 U.S. 436, 475 (1966); Re Gault, 387 U.S. 1, 42 (1967). This Court has interpreted the Zerbst standard to require that the defendant himself waive the constitutional rights even though he is represented by counsel. The language of Cross v. United States, 117 U.S. App. 56, 325 F.2d 629, 631 (1963) is clear:

On the subject of waiver, 'It has been pointed out that courts indulge in every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights'. . . . This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." Johnson v. Zerbst, 304 U.S. 458, 464-465, 58 S.Ct. 1019, 1023, 82 L.ed 1461 (1938), quoted in Carnley v. Cochran, 369 U.S. 506, 514-515, 82 S.Ct. 884 8 L.ed 2d 70 (1962). This means that where the defendant is available, "the serious and weighty responsibility" of determining whether he wants to waive constitutional right requires that he be brought before the court, advised of that right, and then be permitted to make "an intelligent and competent waiver". This has been the uniform practice. (emphasis added) Id at 325 F.2d at 631

The appellant respectfully submits that this requirement applies to this case where defense counsel, through stipulations and other actions, has admitted the guilt of the defendant. At the point of the trial where it became apparent to the trial court that the appellant's counsel was admitting that the appellant committed the offenses charged, the judge should have called the defendant forward, warned him of his constitutional rights, advised him of the effect of his counsel's actions, and asked him whether he wished to waive his rights. In the words of this Court "At least an on-the-record statement in open court by the defendant himself should be required." Cross v. United States, 117 U.S. App. D.C. 56, 325 F.2d 629, 633 (1963) Such a procedure would have placed no burden on the trial court and would have insured that the defendant's waiver of his constitutional rights was intelligent and voluntary.

Moreover, the activities of defense counsel effectively waived "the most important right known to our system of criminal law - the right to be adjudged innocent or guilty by his peers upon the vidence presented in open court." United States v. Follette, 395 F.2d 721, 724 (2d Cir. 1968). Even though the appellant's counsel did assert the defense of insanity, his admission that the appellant committed the offenses was tantamount to a plea of guilty on the merits. As such, this situation comes within the letter and spirit of Rule 11, Fed.R.Crim.P. and the provisions of the Rule should have been applied. The same considerations that prompted the promulgation of Rule 11 are present here. A defendant is admitting that he committed the offenses charged and in doing so he is waiving important constitutional rights. Before permitting such an admission, the trial court should call the defendant before the bench and personally examine the defendant in accordance with the provisions of Rule 11 to determine whether these admissions are made voluntarily with a full understanding of the consequences of his actions.

THE DEFENDANT'S STATEMENT TO THE
FBI AGENT HOGGARD WAS ERRONEOUSLY
ADMITTED IN EVIDENCE *

Confessions made while an accused is in police custody are constitutionally suspect. Frazier v. United States, U.S. App.D.C. F.2d (No.21, 426, March 14, 1969, p.2); Miranda v. Arizona, 384 U.S. 436 (1966); see also Escobeda v. Illinois, 378 U.S. 478 (1964). This Court, in Frazier v. United States, recently summarized the effect of Miranda and the Supreme Court's holding as follows:

"In Miranda, the Supreme Court eschewed this uncertain detour through Rule 5(a) and attacked the problem of custodial interrogation directly. It held that the accused is entitled to the assistance of counsel before he is questioned and, in effect, that any confession he makes while in exclusive police custody prior to arraignment is presumptively inadmissible under the Fifth and Sixth Amendments. Such confessions can stand if, but only if, the accused affirmatively and understandingly waives his rights, and the government bears 'a heavy burden' in attempting to show such a waiver.

Thus, absent convincing evidence of waiver, no confession may be admitted, regardless of the dispatch with which the accused is presented before a magistrate." Frazier, supra at p.7-8

During the trial of the case and subject to admonitions from the Court (Tr.310-313) that the statement was to be considered only in relation to the insanity defense and was not to be considered as a part of the case in

* See Tr. 59, 286-307, 310-315

chief, the Government introduced through the testimony of FBI Agent Hoggard a statement made by the defendant shortly after his arrest. (Tr.313-14) The Court conducted a separate hearing out of the presence of the jury as to the admissibility of this statement. (Tr.286-307) The only witness heard at that time was the FBI agent. At the conclusion of the FBI agent's testimony the Court ruled that the statement had been voluntarily made and should be admissible. (Tr.306-7) While the key factor behind the Court's ruling appears to have been the presentation by the agent as the government's Exhibit A the printed form containing Miranda warnings as signed by the defendant, there still remained a very serious question as to whether the partial waiver had been understandingly made.

There are facts indicated on the record in this case demonstrating that this waiver was not understandingly made. There is no question on the record in this proceeding, and the government has so conceded (Tr.241,322-4) that the defendant was suffering and is suffering from a mental illness. The defendant has a long history of alcoholism. (Tr.59) He was arrested in a bar (Tr.288), the arrest taking place at 1:25 p.m. (Tr.288), quite early in the day. The arresting FBI agent candidly admitted: "Oh, I knew he had been drinking. He had a drink in his hand." (Tr.303) At the time of the arrest the defendant had a drink in his hand consisting of a shot glass "more empty than full" (Tr.303), which was apparently whiskey and definitely was not beer. (Tr.303) The agent was only concerned as to whether the individual was, in the agent's opinion, "intoxicated", a standard by which the agent was only concerned as to whether or not the defendant "is capable of carrying on a conversation and walking to the car." (Tr.304) This is a standard quite

different from that which should be applied to a "waiver" of a constitutional right "understandingly made". The agent admitted that the defendant appeared nervous even to the extent that his hand might have been shaking. (Tr.295) There is no doubt that when the defendant was first shown the form he refused to sign it. (Tr.290) The form that he eventually did sign was precisely the same one which he had previously refused to sign. (Tr.293)

The defendant was verbally informed of his rights while the agent was taking him outside the restaurant where he had been arrested and while the agent was putting him in the car. This mixture of physical activity while orally informing the defendant of his rights is not conducive to an understandingly made waiver. At that time the form card was not being read to the defendant, but the elements of the Miranda warnings were being given by the agent "from my memory". (Tr.289) It did not appear that all elements of the Miranda warning were orally given to the defendant, since the agent admitted that he didn't tell him verbally that counsel would be provided for him if he couldn't obtain counsel although that warning would have appeared on the written form. (Tr.290) While the agent was aware from a photo of the defendant that he did wear glasses (Tr.301,302), he did not recall whether the defendant was wearing his glasses either when arrested or at the time he was given the form to read, either in the car or when returned to the headquarters field office. (Tr.302)

It also appears that the giving of the confession and possibly the signing of the waiver was induced by the FBI agent through a statement to the FBI in Alexandria, Virginia. (Tr.299,300)

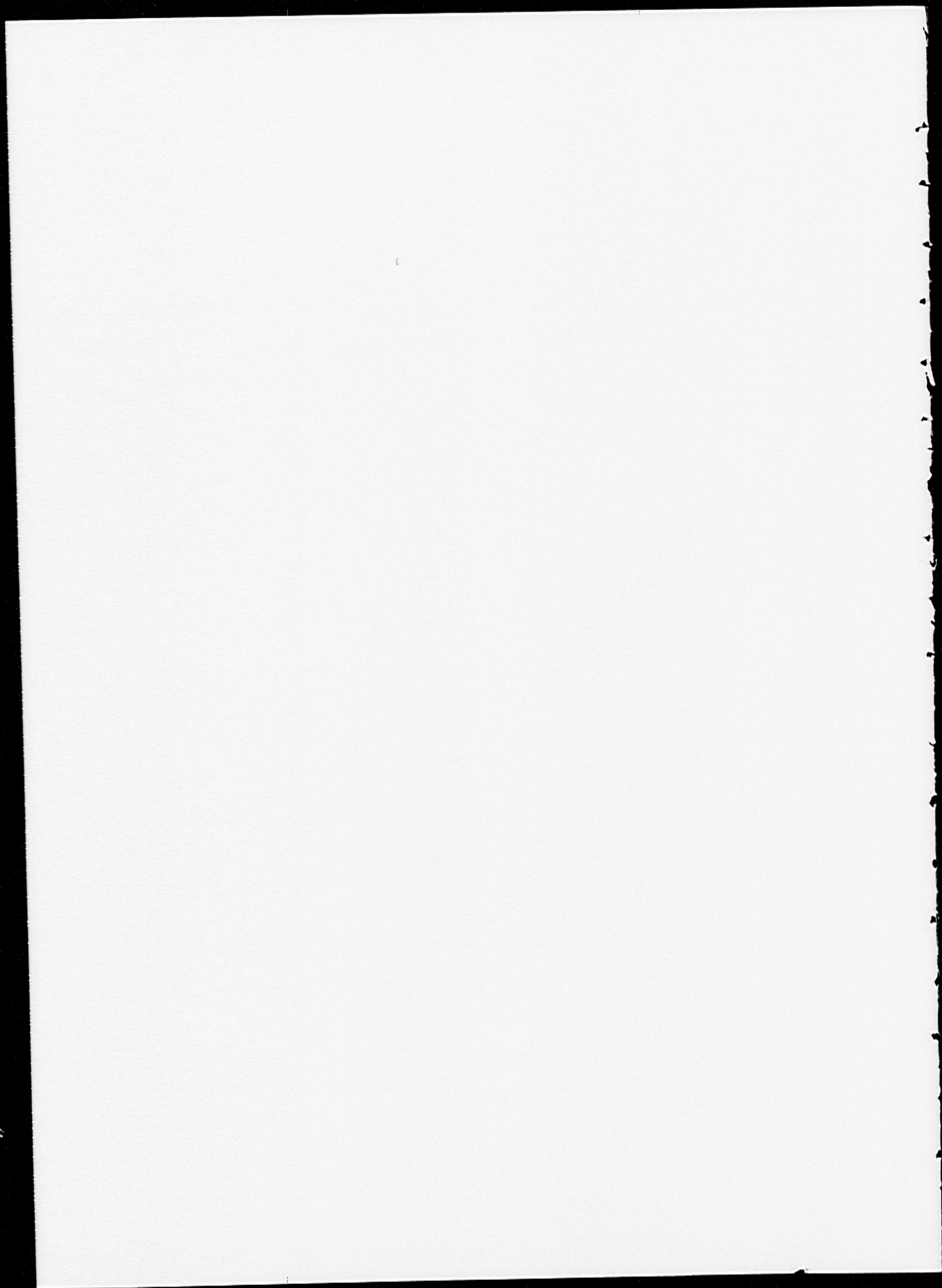
By the FBI's own admission, the defendant initially refused to sign the Miranda form card because he did not want to talk at that time. (Tr.290)

During the course of the auto trip back to the field office, while background information was being elicited by way of name, age, etc., when the defendant indicated "I would like to talk about it", the agents refused to let him speak "until we get back to the office because we have to get this form for you to sign because we are not going to talk to you unless you sign the form." The agent also later admitted that the defendant had initially refused to talk and sign the form. (Tr.298-9)

According to the form, the defendant signed the Miranda waiver at 2:17 p.m. (Tr.294)

Defense counsel objected to the admission of the confession. (Tr.211)

To the extent the record below developed the circumstances surrounding the waiver, the government did not provide the necessary evidence to dispel the doubts as to whether the waiver was understandingly made. Frazier v. United States, U.S.App.D.C. F.2d (No. 21,426, March 14, 1969, page 12) The government has not carried its "heavy burden. . .to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination. . . ." Miranda v. Arizona, 384 U.S. 436, 475 (1966). Any one of the circumstances surrounding the confession taken singly, i.e. history of mental condition, alcoholism, drinking straight liquor at midday display of nervousness including shaking hands, initial refusal to sign waiver form, incomplete oral warning of constitutional rights, distracting physical activity at time of oral warning, possible absence of reading glasses, possible use of earlier statement by way of inducement, would be sufficient to challenge a knowing and intelligent waiver. Collectively they destroy the



possible existence of a knowing and intelligent waiver. Under the circumstances in this proceeding, it is clear that the government has not demonstrated that the defendant knowingly and intelligently waived his privilege and, therefore, the Court below committed error in admitting the statement.

CONCLUSION

Appellant prays that this Court reverse his conviction and remand with instructions to enter a judgment of acquittal, or, in the alternative, to reverse and remand for a new trial.

Respectfully submitted,

JOHN M. CLEARY

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief has been personally served at the Office of the United States Attorney, United States District Courthouse, Washington, D.C., this 20th day of August, 1969.

JOHN M. CLEARY

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA

No. 23,022

UNITED STATES OF AMERICA

vs.

HOWARD D. BROWN, APPELLANT

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF COLUMBIA

REPLY BRIEF ON BEHALF OF APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

FILED

NOV 10 1969

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NOVEMBER 3, 1969

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UNITED STATES COURT OF APPEAL FOR
THE DISTRICT OF COLUMBIA

No. 23,022

UNITED STATES OF AMERICA

vs.

HOWARD D. BROWN, APPELLANT

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF COLUMBIA

REPLY BRIEF ON BEHALF OF APPELLANT

PRELIMINARY STATEMENT

Appellant's Brief in this proceeding was filed on August 20, 1969. The Brief for Appellee was filed on October 20, 1969 at which time appellant's counsel received a typewritten copy of that document. Counsel for appellant has since received a copy of the final printed Brief of the appellee and all page references will be made to that document.

Appellant's position in this case was set out in detail in the Brief for appellant filed August 20, 1969. To avoid undue repetition, appellant will not reiterate those contentions. However, in the opinion of the appellant, the Government has indulged in erroneous treatment of certain important issues in this case. For that reason, appellant submits a reply brief covering such issues.

THE GOVERNMENT IS IN ERROR IN ITS
CONTENTION THAT THE FAILURE OF THE COURT
TO QUESTION THE DEFENDANT PERSONALLY
AS TO HIS CONSENT TO STIPULATIONS MADE BY
HIS COUNSEL DID NOT CONSTITUTE
REVERSIBLE ERROR

It is clear that in the federal system. Rule 11 F.R.C.P. requires that the court address the accused personally in determining the voluntariness of a plea of guilty McCarthy v. United States, 394 U.S. 459 (1969). It is also clear that in a state proceeding the trial judge cannot accept a guilty plea without an affirmative showing that it was made intelligently and voluntarily. Boykin v. Alabama, 395 U.S. 238 (1969). The instant case involves a forgery charge where the defendant asserted an insanity defense. Such a trial involves two issues: (1) Did the defendant in fact, commit the offenses charged; and (2) Was the defendant criminally responsible for these alleged acts at the time of their commission?

At the trial in this case appellant's counsel agreed to a stipulation of facts which was introduced into evidence. This stipulation stated all of the facts necessary to establish that the appellant had committed the alleged offenses, and as a result the stipulation had a profound effect upon the defendant's trial. This action relieved the government of its obligation

to call its witnesses in the merits of the case. It denied the appellant the opportunity to cross-examine these witnesses. It in effect, took the question of the defendant's guilt on the merits away from the jury, and admitted that the defendant had committed the offenses charged. The question presented in this case is whether this stipulation involved such an important waiver of the appellant's constitution rights so as to fall within the spirit of Rule 11, F.R.C.P. and require that the trial court personally examine the appellant to determine whether he understood the effect of his counsel's activities and whether he intelligently and knowingly waived his constitutional rights.

Rule 11, F.R.C.P. requires that the court personally examine the defendant as to the voluntariness of a guilty plea. As recently noted by the United States Supreme Court, the imposition of this Rule arose because such a plea involves the waiver of several important constitutional rights:

A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be "an intentional relinquishment of abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 82 L.ed 1461, 1466, 58 S.Ct. 1019, 146 ALR 357 (1938) McCarthy v. United States, 394 U.S. 459, (1969)

The waiver of these same constitutional rights is involved in the instant case. The stipulation agreed to by appellant's counsel admitted that the appellant had committed the offenses charged and effectively waived his privilege against self-incrimination. Also, it effectively waived the appellant's right to trial by jury on the merits of his case and, by eliminating the need for the calling of a government witness on the merits of his case, it waived his right to confront and cross-examine his accusers on that important aspect of his case. Therefore, the appellant respectfully submits that this case falls within the spirit of Rule 11, F.R.C.P. so as to require that the trial court should have personally examined the appellant to determine whether he was making "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938)

The appellant recognizes that defense counsel has discretion in the conduct of trial. He also recognizes that the exercise of this discretion in certain situations may give defense counsel limited authority to waive the defendant's constitutional rights. However, this authority is not without limitation. In Brookhart v. Janis, 384 U.S. 1 (1966) the United States Supreme Court held that defense counsel had no authority to submit the defendant to a "prima facie" trial. In Cross v. United States, 117 U.S. App. D.C. 56, 325 F.2d 629 (1963) this court held that defense counsel's statement that the defendant declined to come into the courtroom was not adequate to waive the defendant's right to be present at trial. This Court held that "At least an on-the-record statement in open court by the defendant himself should be required" to effectively waive the defendant's constitutional right to be present at his

trial. Id at 60, 325 F.2d at 633. In Cross the Court also noted that in this Circuit "waivers by defendants of the constitutional rights to indictment and to trial by jury are taken in open court in writing, signed by the defendant personally on forms prescribed for the purpose." (emphasis added) Id at 58, 59, 325 F.2d at 631, 632. Also in the case of a plea of guilty in federal court, it is required that the court address the accused personally to determine whether he is knowingly and voluntarily waiving his constitutional rights. McCarthy v. United States, 394 U.S. 459 (1969). It is apparent that both the United States Supreme Court and this Court recognize the principle that the waiver of important constitutional rights must be made by the defendant himself and not by his counsel. The appellant respectfully submits that this principle should be applied to the instant case which involves the waiver of the appellant's privilege against self-incrimination, his right to confront and cross-examine the witnesses against him on the merits of his case, and his right to a jury trial on the merits.

In the opinion of the appellant, the cases relied upon by the government are inapplicable to this case. The government places principal reliance upon two Ninth Circuit cases involving habeas corpus proceedings, Wilson v. Gray, 345 F.2d 282 (9th Cir.), cert denied, 382 U.S. 919 (1965) and Poole v. Fitzharris, 396 F.2d 544 (9th Cir. 1968). In both cases the defendant's counsel stipulated to a trial without a jury on the transcript of the preliminary hearing and the Ninth Circuit upheld this procedure. In Wilson, supra, the defendant personally waived his right to trial by jury and each side retained the right to produce additional

evidence at trial. In Poole, supra, the defendant retained the right to offer evidence and did in fact take the stand. Several important factors which distinguish these cases from the instant case and render them inapplicable to the facts here in issue. In Wilson, supra, the defendant personally waived his right to jury trial and, although the record is silent, it is very probable that this was also the case in Poole, supra. In the instant case, the stipulation of facts by defense counsel effectively waived the appellant's right to be tried by a jury on the merits of his case without any indication of consent by the appellant. In both Wilson, supra, and Poole, supra, since the testimony was stipulated on the preliminary hearing transcript, the defendants had the opportunity to confront and cross-examine the witnesses against them at that proceeding. In the instant case, due to the stipulations made by appellant's trial counsel, the Government's witnesses on the merits were never called and, as a result, never cross-examined on the trial record. Perhaps most important, neither Poole, supra, nor Wilson, supra, involved the defendant's important privilege against self-incrimination. In both these cases, the defendant's counsel continued to contend that the defendants had not committed the offenses until the judge reached his verdict. However, in the instant case, the stipulations agreed to by defense counsel were highly incriminatory. In fact, they admitted that the defendant committed the offenses charged (Tr.28-34) as well as thirty or forty other offenses (Tr.313-315) The appellant respectfully submits that these very important distinctions render these two cases, upon which the government principally relies, inapplicable to the instant case.

The appellant also submits that the two other cases cited by the government are inapplicable to this case. Diaz v. United States, 223 U.S. 442 (1912) dealt only with the waiver of the right of confrontation and held that a defendant who voluntarily absents himself from his trial could waive his right to be present. With respect to this situation, this Circuit has held that a defendant in the Government's custody can be deemed to have waived his right to be present only if he personally waives this right by an on-the-record statement in open court. Cross v. United States 117 U.S.App. D.C. 56, 325 F.2d 629 (1963). In the case of a defendant not in Government custody, this Circuit has recently held that such a defendant can be deemed to have waived his right to be present only if it is affirmatively determined that the defendant knew that his trial could continue without him. United States v. William B. McPherson, D.C. Cir. No. 22,312 (Decided October 2, 1969). Both of these decisions, Cross, supra, and McPherson, supra, are based on the Zerbst doctrine, 304 U.S. 452, 464 (1938), relied upon by the appellant. It is also of interest to note that in Diaz the defendant personally sent to the court a message expressly consenting that the trial proceed in his absence. Diaz v. United States, 223 U.S. 442, 453 (1912). The Government also cites Cruzado v. Puerto Rico, 210 F.2d 729 (1st Cir. 1954) which held that defense counsel may stipulate that the defendant be tried on the record of the trial of his co-defendants who were tried separately. Here again, the witnesses were confronted and cross-examined at the prior trial and defense counsel did not admit that the defendant committed the offenses. Also the case appears to be contra to the later Cross decision, supra, of this Circuit.

The appellant does not contend that defense counsel cannot stipulate to any facts. Nor does he contend that defense counsel can never stipulate the testimony of a witness. However, the appellant does submit that defense counsel, in a case such as this, cannot stipulate the testimony of all Government witnesses on the merits without an on-the-record indication that the defendant realizes the effect of such a stipulation and consents to such action. The inherent dangers involved in a broad stipulation such as this are apparent from the record in this case. This action effectively waives several of the defendant's most important constitutional rights without any indication of the consent of the defendant. Surely such a procedure does not meet the standards for waiver established by the Zerbst doctrine, supra, and recognized by both this Circuit, Cross v. United States, 117 U.S.App.D.C. 56, 325 F.2d 629 (1963), United States v. McPherson, D.C. Cir.No. 22,312 (Decided October 2, 1969) and the United States Supreme Court in Miranda v. Arizona, 384 U.S. 436, 444 (1966), Escobedo v. Illinois, 378 U.S. 478, 490, n.14 (1964), Adams v. United States, ex rel. McCann, 317 U.S. 269 (1942), Boykin v. Alabama, 395 U.S. 238, 242 (1969), McCarthy v. United States, 394 U.S. 459, 466 (1969). In order to comply with the requirements for waiver established by the above case, the trial court should have personally questioned the appellant to determine whether he understood the effect of the stipulations and whether he voluntarily waived his important constitutional rights. Such action would have placed no burden on the court but would have insured that the appellant was aware of the effect of the processes taking place and had indicated that he consented to such actions. On this record it appears that the appellant's

important constitutional rights were waived without his consent in violation of due process. The appellant respectfully submits that the trial court's failure to personally question the appellant constitutes reversible error in this case.

II. IN LIGHT OF THE CIRCUMSTANCES
SURROUNDING THE CONFESSION, THE TRIAL COURT
ERRONEOUSLY ADMITTED THE APPELLANT'S STATEMENT

The appellant respectfully submits that in light of the circumstances surrounding the appellant's confession in this case (Appellant's Brief pages 15-17) the Government has failed to sustain its heavy burden in attempting to show a waiver of his privilege against self-incrimination. Frazier v. United States, No. 21, 426 pps. 7-8 (Decided March 14, 1969). The appellant recognizes that it is possible for the police to convey to the accused sufficient understanding of his rights to make an intelligent waiver. However, in the instant case any one of the circumstances noted in Appellant's Brief would raise serious doubts as to whether a sufficient understanding had been conveyed to the appellant in this case. The totality of the circumstances negates such a possibility.

CONCLUSION

WHEREFORE, appellant respectfully reaffirms his prayer that the court reverse the conviction and remand with instructions to enter a

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judgment of acquittal, or, in the alternative, to reverse and remand for a new trial.

Respectfully submitted.

JOHN M. CLEARY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing reply brief on behalf of appellant has been personally served at the office of the U.S. Attorney, U.S. District Court House, Washington, D.C. this 4th day of November, 1969.

JOHN M. CLEARY